

**Before the
Federal Communications Commission
Washington, D.C.**

In the Matter of)	
)	
GAME SHOW NETWORK, LLC,)	MB Docket No. 12-122
Complainant,)	File No. CSR-8529-P
)	
v.)	
)	
CABLEVISION SYSTEMS CORP.,)	
Defendant)	

TO: Chief Administrative Law Judge Richard L. Sippel

**CABLEVISION SYSTEMS CORPORATION'S
POST-TRIAL BRIEF**

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PRELIMINARY STATEMENT

Game Show Network, LLC (“GSN”) has failed to discharge its burden of proving that Cablevision Systems Corporation (“Cablevision”) discriminated against it on the basis of affiliation. That is because the evidence, taken as a whole, shows that Cablevision made a rational and good faith business judgment to move GSN to a less penetrated tier of service without regard to GSN’s affiliation and without consideration of the impact of the retiering decision on Cablevision’s affiliated networks, WE tv and Wedding Central.

First, GSN has failed to present direct evidence of discrimination by Cablevision. Although GSN has maintained throughout this case that Cablevision has discriminated against it, what the evidence as opposed to the rhetoric shows is that Cablevision made the decision to reduce carriage of an out-of-contract, unpopular network in order to save in annual carriage fees at a time of rapidly escalating programming expenses. Cablevision’s executives testified unambiguously that Cablevision made the decision to retier GSN to save over per year and that WE tv and Wedding Central played no role in that decision. That testimony is not only credible, it is corroborated by contemporaneous business documents outlining the rationale for the decision to reduce GSN’s carriage. Although GSN shrilly argues that those documents should be dismissed as “pretextual,” there is no evidence to back up the claim of pretext. No document contradicts any of this evidence.

Unable to muster any direct evidence that Cablevision discriminated in the carriage decision, GSN attempts to rely on snippets of evidence purporting to show that Cablevision generally favored its affiliated networks, including with respect to carriage negotiations, , and channel placement. But such evidence—even if credited—does not satisfy GSN’s burden of providing discrimination with direct evidence. To

do that, GSN had to come forward with evidence showing that the carriage decision itself was colored by considerations of affiliation. GSN has failed to do so.

GSN similarly falls short in its attempt to meet its direct evidence burden by focusing the Presiding Judge on discussions between the parties *after* Cablevision made its retiering decision. No document or testimony proves that Cablevision made the GSN carriage decision for the purpose of leveraging carriage of Wedding Central on DIRECTV in return for continued broad carriage of GSN. What the evidence shows is that DIRECTV injected itself into the discussions between GSN and Cablevision and, once the discussions initiated by DIRECTV failed, Cablevision continued to negotiate with GSN and its other owner, Sony, to see if sufficient value could be imparted to Cablevision to justify continued payment of

in carriage fees to GSN. If the sole point of the retiering had been to win carriage for Wedding Central on DIRECTV, these negotiations—which had nothing to do with Wedding Central—would have been entirely beside the point.

Second, GSN not only failed to prove its case by direct evidence, it also failed to come forward with circumstantial evidence to meet its burden under Section 616. To do so GSN must prove that it was similarly situated to WE tv at the time of the carriage decision. GSN has not and cannot do so. Although GSN relies on snippets of purported similarity, the evidence as a whole, measured against the metrics developed by the Commission in prior carriage proceedings, shows that GSN and WE tv are fundamentally different programming networks.

Programming: GSN is a network devoted almost exclusively to game show and competition programming. That is how it describes itself in its marketing presentations. Whether the Court looks at sample GSN programming schedules,

GSN's internal documents, or the comprehensive genre study conducted by Cablevision expert Michael Egan, the result is the same: GSN's programming consists of game shows, a limited number of competition programs, and, on two primetime nights per week in the period leading up to the retiring, poker. By contrast, WE tv's women-oriented programming could not be more different. WE tv defines itself in its marketing materials, and branding as a women's network. It consistently schedules reality shows, movies, comedies, dramas, and documentaries about women, their lives, and topics of interest to them. Its programming lacks the "competitive DNA" that is the hallmark of GSN; WE tv aired one game show in its history, cancelled it after a handful of episodes, and has never transmitted a poker show. In the end, the only purported similarity to which GSN can point is a handful of shows, largely launched post-retiring, which have a dating or relationship context. That falls far short of showing that its programming is similar to that of WE tv.

Target Audience: There is no dispute that WE tv targets women in the 18 to 49 and 25 to 54 demographics. Although GSN strained at trial to emphasize that it, too, targeted the same groups of women, the weight of the evidence revealed no such consistent focus on its part. GSN's marketing materials emphasized GSN's effort to attract all game-loving adult viewers—not just women and certainly not just women in the 18 to 49 and 25 to 54 demographics. As GSN's former head of distribution, Dennis Gillespie, candidly admitted, GSN targeted a broad-based, family audience. The fact that GSN developed a few shows aimed at younger women does not transform the network into a close competitor of WE tv, which maintained a laser focus on women viewers between 18 and 54.

Actual Audience: GSN and WE tv attract very different audiences. Although both skew more heavily to women viewers than men, that overlap is simply too general to have any meaning, particularly since most cable networks skew female. A more meaningful and granular comparison of the two networks' audiences shows that approximately [REDACTED] of WE tv's primetime audience is composed of women 25 to 54, while GSN draws only [REDACTED] of its audience from that key WE tv demographic. The largest share of GSN primetime viewers are made up of women and men 55 and older, two demographic groups that are decidedly not the core of WE tv's audience.

Advertising: The evidence shows that advertisers viewed GSN and WE tv differently, in large measure because of the different audience demographics of the two networks. Although GSN claims to have targeted its advertising at 25 to 54 year old women, in reality it earned less than [REDACTED] of its ad revenues from advertising aimed specifically at that group. That is because GSN does not deliver a significant female 25 to 54 year old audience. By contrast, WE tv over-indexes in the same women's 25 to 54 demographic and, unlike GSN, has a median viewer age well within it. Market evidence confirms this. DIRECTV and DISH do not include GSN in the same women-oriented advertising clusters in which they placed WE tv. And WE tv sold ads at [REDACTED] a rate as did GSN, reflecting the greater value advertisers place on the more targeted and younger WE tv audience.

Third, GSN's Section 616 claim also fails because there is no evidence to contradict the fact that Cablevision retired the network in the exercise of its legitimate business judgment. The contemporaneous documentary evidence—and supporting testimony—shows that Cablevision, faced with escalating programming costs and vigorous competition, considered

GSN's annual cost and relatively small audience and made the rational business decision to re-tier the network. The Commission has recognized that the role of Section 616 is not to second-guess this type of rational business judgment.

Although GSN now labels Cablevision's business reasons for re-tiering GSN "pretextual," there is no evidence that Cablevision made its decision for any reasons other than the legitimate ones reflected in its documents and testified to by its executives. Any claim that, notwithstanding this evidence, Cablevision re-tiered GSN to help WE tv is further undermined by Cablevision's contemporaneous launch of , a women's network that, in contrast to GSN, WE tv viewed as a direct competitor.

Nor is there any requirement under Section 616 obligating Cablevision to do a cost-benefit analysis of unaffiliated, non-similar networks every time it makes an unrelated carriage decision. In any case, the economic analyses presented to the Presiding Judge support the rationality of Cablevision's decision. Mr. Orszag provided a reliable analysis identifying the net benefits to Cablevision, including an annual savings of in carriage fees and an increase in the subscriber base for Cablevision's Sports & Entertainment tier, without any meaningful loss of subscribers. Dr. Singer's contrary analysis depends on unfounded assumptions and unproven methodologies, all of which are contradicted by the record evidence.

Finally, and critically, GSN has also failed to meet its burden of showing that it has been "unreasonably restrained" in its "ability to compete fairly." GSN is not a struggling network that has been fundamentally disadvantaged by Cablevision's carriage decision; it is a thriving, fully-distributed national network that, since the re-tiering, has grown in distribution, subscribership and revenues. Neither the Presiding Judge nor the Commission has ever sustained

a claim of discrimination in circumstances such as these. The evidence produced at this trial, we respectfully submit, provides no reason to do so here.

ARGUMENT¹

GSN, as complainant, bears the burden under Section 76.1301 of proving by a preponderance of evidence that, in making the decision to re-tier GSN, Cablevision discriminated against it on the basis of affiliation.² To satisfy this burden, GSN must present either direct evidence of such discrimination or circumstantial evidence supporting an inference that discrimination occurred.³ Absent conclusive direct evidence of discrimination in connection with the actual re-tiering decision, GSN must demonstrate through a preponderance of evidence *both* (i) that GSN is “similarly situated” to a network affiliated with Cablevision, *and* (ii) that Cablevision has treated GSN differently from its affiliated network with respect to the selection, terms, or conditions of carriage.⁴ GSN must prove that it is similarly situated to WE tv based on factors identified by the Commission: target programming, programming genre, target audience, actual audience, target advertisers, or other similar factors.⁵ Evidence of similarity, moreover, must be assessed at the time of the alleged discriminatory act to have probative value.⁶

¹ The relevant facts are set forth in Cablevision’s Proposed Findings of Fact and Conclusions of Law, and its Reply Findings of Fact and Conclusions of Law, filed herewith. They are incorporated herein by reference. Specific paragraphs in the Proposed Findings of Fact and Conclusions of Law are cited as “CV FOF & COL ¶ __.” Specific paragraphs in the Reply Findings of Fact and Conclusions of Law are cited as “CV Reply ¶ __.”

² See CV FOF & COL ¶¶ 221-27; CV Reply ¶¶ 97-98.

³ CV FOF & COL ¶¶ 222-23; CV Reply ¶¶ 99, 107.

⁴ CV FOF & COL ¶ 223; CV Reply ¶ 101.

⁵ CV FOF & COL ¶¶ 223, 236-46; CV Reply ¶ 108.

⁶ CV FOF & COL ¶ 245 & n.746.

Even if GSN is able to demonstrate that it is similarly situated to one of Cablevision's affiliated networks, GSN must also prove that Cablevision's decision was not a product of sound business judgment. The presence of "legitimate reasons for" an MVPD's carriage decision preclude a finding of discrimination.⁷ GSN has the final additional burden of proving that Cablevision's decision unreasonably restrained GSN's ability to compete fairly.⁸

As we show below, GSN has not met any of its burdens and its Section 616 claim should be dismissed.

I. Cablevision Did Not Discriminate Against GSN

A. GSN Did Not Meet Its Burden of Proving Direct Evidence of Discrimination

Direct evidence of discrimination consists of contemporaneous documents or witness testimony showing that an MVPD made the allegedly discriminatory carriage decision on the basis of the complainant's non-affiliation with the MVPD or in consideration of the interests of the MVPD's affiliated networks.⁹ Here, the evidence supports no such conclusion. No document even suggests that Cablevision's retiering decision had anything to do with GSN's non-affiliation or with advancing the interests of WE tv or Wedding Central. Nor did any Cablevision or WE tv witness testify to this effect; to the contrary, each of the fact witnesses called by Cablevision either live or by deposition specifically denied that considerations relating to Cablevision's affiliated networks played any role in the retiering decision.¹⁰

⁷ CV FOF & COL ¶ 224; CV Reply ¶¶ 111-14.

⁸ CV FOF & COL ¶ 226; CV Reply ¶ 116.

⁹ CV FOF & COL ¶ 221; CV Reply ¶¶ 99-100.

¹⁰ CV FOF & COL ¶¶ 55-56; CV Reply ¶¶ 11-20.

In the absence of actual direct evidence of discrimination in the carriage decision, GSN attempts to rely on evidence purportedly showing that Cablevision treated its affiliated networks better than GSN with respect to carriage negotiations, , and channel placement.¹¹ GSN also claims that discrimination can be inferred from the parties' discussions concerning the continuation of broader GSN carriage in the period after Cablevision communicated the retiering decision to GSN—discussions *initiated by GSN and DIRECTV* at the request of GSN's CEO.¹² Neither claim amounts to direct evidence of discrimination.

First, GSN cannot prove discrimination through evidence purporting to show that Cablevision treated WE tv or Wedding Central better with respect to issues that are not directly related to the decision to retier GSN. Direct evidence of discrimination consists of evidence showing that the challenged carriage decision *itself* was based on considerations of affiliation.¹³ GSN cannot make up for the absence of such evidence by showing, for example, that Cablevision afforded better channel placement to its affiliated networks than to GSN. This case, as reflected in GSN's complaint initiating this proceeding, is about the decision to retier GSN; GSN has not brought this action to obtain a more favorable slot on the dial. In any event, the record shows that Cablevision did not unduly favor its affiliated networks. Cablevision negotiated with the Rainbow networks at arms-length and, as a result, carried WE tv and

¹¹ CV FOF & COL ¶¶ 177-185.

¹² CV FOF & COL ¶¶ 58-68.

¹³ CV FOF & COL ¶ 229; CV Reply ¶¶ 100-104. The Commission sets a high bar for direct evidence of discrimination: it is either “an email from the defendant MVPD stating that the MVPD took an adverse carriage action against the programming vendor because it is not affiliated with the MVPD” or “an affidavit from a representative of the programming vendor involved in the relevant carriage negotiations detailing the facts supporting a claim that a representative of the defendant MVPD informed the vendor that the MVPD took an adverse carriage action because the vendor is not affiliated with the MVPD.” CV Reply ¶ 100 n.257.

Wedding Central at the same rates and on the same terms—including channel placement—as other MVPDs.¹⁴ Similarly, whatever the merits of the

—and however it was resolved—that dispute has nothing to do with whether Cablevision discriminated based on affiliation when it retiered GSN.

Nor do the discussions between DIRECTV and GSN constitute direct evidence that Cablevision made a discriminatory decision to retier GSN. There is no proof that Cablevision made its retiering decision to extract carriage for Wedding Central on DIRECTV. To the contrary, GSN's own executives first cooked up the idea of trading Wedding Central carriage for a new deal for GSN.¹⁵ The evidence also shows that Mr. Chang of DIRECTV initiated the dialogue with Cablevision that led to the exploration of a deal involving both GSN and Wedding Central.¹⁶ GSN's ginned up theory of an orchestrated *quid pro quo* is at odds with the fact that, even after DIRECTV made clear that it would not carry Wedding Central, Cablevision engaged in discussions with GSN and Sony in an effort to restore broad GSN carriage.¹⁷ GSN's assertion that discriminatory intent can be inferred from these discussions, if credited, would chill any incentive for parties to a carriage dispute to resolve that dispute. Given the protracted nature of proceedings such as these, such a result would make no sense.

B. GSN and WE tv Were Not Similarly Situated

GSN's attempt to establish a circumstantial case of discrimination similarly fails. GSN must prove substantial similarity between it and Cablevision's affiliated networks with

¹⁴ CV FOF & COL ¶¶ 180-82, 184-85; CV Reply ¶¶ 13-14, 17-20.

¹⁵ CV FOF & COL ¶¶ 59-60; CV Reply ¶¶ 22-23.

¹⁶ CV FOF & COL ¶ 61; CV Reply ¶ 23.

¹⁷ CV FOF & COL ¶¶ 63-67, 234-35; CV Reply ¶ 25.

respect to programming genre and target programming, target audience, actual audience, and advertising.¹⁸ Relying on bits and pieces of evidence, GSN has fallen woefully short. GSN cannot prove that GSN and WE tv carried the same programming by comparing only a handful of shows. GSN cannot prove that it and WE tv targeted the same audience through self-serving testimony from GSN executives that is contradicted by its own documents. GSN cannot prove that GSN and WE tv delivered the same audience when an appropriately granular demographic analysis exposes the sharp differences between the networks. It cannot prove that advertisers viewed GSN and WE tv as similar by ignoring the actual data that advertisers use in the real world. And GSN cannot prove its case solely by critiquing Cablevision's experts, all of whom gave testimony that was relevant, credible, and reliable.

1. The Networks Do Not Have Similar Programming

Uniquely positioned with its "competitive DNA," GSN's programming schedule is dominated by game and competition shows, including poker. Virtually every show has a contest, a winner and a prize.¹⁹ By contrast, WE tv focuses on shows concerning and appealing to women, including "scripted" comedies, dramas, and movies, which GSN did not air at the time of the retiering.²⁰ There is simply no way to conclude from the facts that the programming on one of these networks is a substitute for the other.

Likewise, GSN's carriage agreements have content descriptions that bear no relationship to those contained in WE tv's agreements, which describe the network

Rather, the carriage agreements accurately and uniquely

¹⁸ CV FOF & COL ¶ 223; CV Reply ¶ 108.

¹⁹ CV FOF & COL ¶¶ 70-72, 83-84, 89-93; CV Reply ¶ 27.

²⁰ CV FOF & COL ¶¶ 85-87.

describe GSN as providing GSN's carriage agreements amount to a telling admission that the network does not air the same type of women-oriented programming as does WE tv.²²

The expert testimony further drives home the point. Although GSN has resorted to *ad hominem* attacks on Mr. Egan, his analysis of the programming genres on the two networks leads to only one conclusion: GSN and WE tv offer different fare to audiences. And while GSN seeks to chip away at the edges by suggesting that the genres adopted by Mr. Egan are not universally accepted in the cable industry, that criticism cannot change the fact that GSN offers hour after hour of game shows that have never been part of the WE tv line up (other than a single game show cancelled after six episodes).²³

GSN also has no answer for the look and feel analysis offered by Mr. Egan, which follows the same methodology that the Court, the Commission, and the Ninth Circuit have all previously credited. This analysis conclusively illustrates the networks' distinctive personalities.²⁴ GSN offered no competing analysis, but rather points to a few cherry-picked shows involving women, relationships, or families (a number of which were aired well after the retiering decision).²⁵

The differences in programming are underscored by additional expert evidence adduced by Cablevision. Mr. Poret's survey demonstrates that viewers perceive the lack of

²¹ CV FOF & COL ¶¶ 71-75; CV Reply ¶ 27.

²² See Tr. 629:7-9.

²³ CV Reply ¶ 30.

²⁴ CV FOF & COL ¶¶ 100-102.

²⁵ CV FOF & COL ¶¶ 140, 241; CV Reply ¶¶ 28, 31.

similarity between the programming on GSN and WE tv.²⁶ Similarly, Mr. Orszag's "direct test" and switching analyses show that viewers do not treat GSN as a substitute for WE tv. As these analyses demonstrate, Cablevision subscribers who lost access to GSN after the retiering did not meaningfully increase viewership of WE tv or Wedding Central.²⁷

2. The Networks Target Different Audiences

GSN does not dispute that WE tv targeted women in the 18 to 49 and 25 to 54 demographics. Ms. Dorée and Ms. Martin testified to this, and WE tv's marketing, branding and programming are all designed to attract that specific audience.²⁸

Although GSN took great pains to claim that it too targeted women 25 to 54, the evidence simply does not back it up. In his testimony GSN's former distribution chief, Mr. Gillespie, forthrightly acknowledged that GSN had no such target audience. To the contrary, he testified that the network consistently emphasized its wide appeal to a broad-based, family audience. And he conceded that GSN never specifically targeted women, much less those in the key 25 to 54 demographic sought by WE tv.²⁹

Contemporaneous GSN documents corroborate Mr. Gillespie's testimony. For example, GSN made plain in its 2009 presentation to _____ that it appealed to a "broad-based," "adult" demographic interested in GSN's game show programming.³⁰ GSN's marketing and promotional materials presented to, *inter alia*, GSN's most important distributors,

²⁶ CV FOF & COL ¶¶ 105-110.

²⁷ CV FOF & COL ¶ 167.

²⁸ CV FOF & COL ¶¶ 124-26.

²⁹ CV FOF & COL ¶¶ 116-18, 240; CV Reply ¶ 33.

³⁰ CV FOF & COL ¶ 116.

highlighted individual shows that largely targeted adults, not women.³¹ When reporting to its Management Committee at the end of 2010,

³² Its

Cable Advertising Bureau presentations explicitly recognized that it targeted both adults and women.³³ And finally, for years before and continuing after the retiering, GSN scheduled and promoted extensive poker programming on weekends—including on Sunday nights—and explicitly targeted male viewers.³⁴ All of this evidence leads to only one conclusion: that GSN lacked the same targeted audience focus as WE tv.

That conclusion is not inconsistent with GSN's claim that it sought to find ways to appeal to younger women, or that it launched of a handful of shows (largely in the period after the retiering) targeting this demographic. A sporadic effort to reach 25 to 54-year old women cannot support a finding of overall similarity in the target audiences of GSN and WE tv. Such a finding would require the Presiding Judge to ignore that much of GSN's programming day was devoted to traditional game show fare (such as *Family Feud*) that appealed to GSN's loyal audience of older women and men, and to ignore that, at the time of retiering, GSN devoted two of seven primetime nights to poker aimed at and attracting an audience of young men.

3. The Networks' Audiences and Ratings Are Different

GSN's claim of audience overlap with WE tv depends entirely on a comparison that is far too general to have any meaning for the Presiding Judge. GSN's "proof" of similarity

³¹ CV FOF & COL ¶ 118.

³² CV FOF & COL ¶ 120; CV Reply ¶ 35.

³³ CV FOF & COL ¶ 121.

³⁴ CV FOF & COL ¶ 122.

in the audiences of the two networks is premised on an analysis of viewership among women 18 and over, rather than the supposedly overlapping 25 to 54 year old women's demographic, and based on national rather than more granular local ratings, even though Cablevision only operates in the New York DMA.³⁵

There is no reason to accept GSN's truncated analysis of the networks' audiences. What the evidence shows is that GSN has both an older and more male audience than WE tv. A Nielsen custom study (commissioned by GSN) of GSN viewership in the fourth quarter of 2010 (the time of the retiering) revealed that the largest group of GSN viewers in primetime (almost of all viewers) were women 55 and over, followed by men in the same age group.³⁶ Women between 25 and 54 comprised only the third largest group of GSN primetime viewers; by contrast that same group of women made up some of WE tv's audience—a percentage three times as high as on GSN.³⁷ Mr. Egan and Mr. Blasius corroborated this point, showing that GSN's national and local Nielsen ratings for women 18 and older were largely driven by women 55 and older and women 65 and older, not the women 18 to 54 targeted by WE tv.³⁸ Mr. Orszag, too, presented a "distance" analysis demonstrating that GSN and WE tv viewers were far apart along a number of demographic dimensions, including viewer age.³⁹

³⁵ CV FOF & COL ¶¶ 127-136; CV Reply ¶ 36.

³⁶ CV FOF & COL ¶ 128; CV Reply ¶ 37.

³⁷ CV FOF & COL ¶¶ 128-29, 133; CV Reply ¶ 37.

³⁸ CV FOF & COL ¶¶ 136 & n.395, 142-44, 147.

³⁹ CV FOF & COL ¶ 138.

Indeed, GSN's median age, as reflected in its internal documents and viewer profiles, was consistently around _____ and higher; WE tv's was consistently in the _____.⁴⁰

Mr. Goldhill acknowledged that if the Court were just to look at the 25 to 54 year old demographic for the two networks, GSN's audience is

⁴¹ Many GSN marketing presentations reflect this skew.⁴² The foundation for this is no mystery: for a large portion of the relevant time period GSN showed primetime poker programming that skewed heavily male, and both men and women are attracted to GSN's game and competition shows.⁴³

4. The Networks Do Not Meaningfully Compete for Advertising

GSN also cannot show that it competes for advertisers with WE tv in any meaningful way. The reason is simple: the demographic differences in audience between the networks are critical to advertisers. As Mr. Blasius—the only expert with actual advertising industry experience—explained, advertisers would find it significant that WE tv's audience concentration in the women 25 to 54 year old demographic is much higher than that of GSN. Audience concentration is particularly important, because advertisers seek to maximize the proportion of total audience composed of viewers in their target demographics—and on this important metric, WE tv performs more than twice as well as GSN.⁴⁴ Advertisers also take note of the meaningful difference in the median ages of the two networks: GSN's consistent median

⁴⁰ CV FOF & COL ¶¶ 131, 134, 148, 242; CV Reply ¶ 40.

⁴¹ CV FOF & COL ¶ 130.

⁴² CV FOF & COL ¶ 119 & n.333; CV Reply ¶ 33.

⁴³ CV FOF & COL ¶¶ 79-82, 122.

⁴⁴ CV FOF & COL ¶ 144; CV Reply ¶ 42.

age of _____ or older makes it a tough sell for advertisers trying to reach women in the 25 to 54 demographic since, by definition, _____ of GSN's audience is outside the age range advertisers are seeking to reach.⁴⁵

GSN's efforts to show its success in selling advertising to women in the 25 to 54 demographic fall short. Advertisers will typically not buy ads on networks appealing to older demographics such as those comprising the majority of GSN viewers, so GSN has little choice but to try to sell advertising targeted at 25 to 54 year old women.⁴⁶ The evidence shows that GSN is, in fact, a weak competitor in this demographic. As GSN advertising chief John Zaccario acknowledged, GSN's advertising revenues based on guaranteed delivery of women between 25 and 54 amount to no more than _____ of GSN's advertising revenue.⁴⁷

Market evidence confirms this. GSN's owner, DIRECTV, is well-attuned to the differences between the advertisers GSN and WE tv can legitimately target. It sells "clusters" of similar networks for advertisers who wish to buy time on a series of networks that can deliver a desired audience. DIRECTV does not group GSN with "Women's Networks" such as WE tv and Lifetime, but rather places it in a separate general entertainment cluster. DISH Network does the same thing.⁴⁸ These clusters accurately reflect the fundamental difference between GSN and WE tv from the perspective of advertisers.

⁴⁵ CV FOF & COL ¶¶ 131, 148.

⁴⁶ CV FOF & COL ¶ 153; CV Reply ¶¶ 43-44.

⁴⁷ CV FOF & COL ¶¶ 151-53; CV Reply ¶ 43 n.117.

⁴⁸ CV FOF & COL ¶ 155; CV Reply ¶ 41.

GSN's evidence of overlapping advertisers is similarly unpersuasive. Large national advertisers place spots on dozens of different types of networks.⁴⁹ In any case, Mr. Orszag showed that only five national brands placed among the top forty advertisers on both networks.⁵⁰ Far more informative is proof that WE tv's CPM pricing is higher than GSN's, clearly indicating that the market values spots on WE tv to a much greater degree than those on GSN.⁵¹

* * *

In a circumstantial discrimination case, the Court and Commission should not have to strain to find sporadic similarities mined from the record. To the contrary, the burden rests where it always does, on the complainant, to prove similarity by a preponderance of all of the evidence, not just the evidence that GSN finds to be supportive of its claim. It is a burden that GSN cannot carry.

C. Cablevision Had Legitimate Business Reasons for Retiering GSN

Even if a complainant can establish similarity to an affiliated network, no finding of discrimination can be made if the evidence reflects legitimate business reasons for an adverse carriage decision. Such reasons include a lack of subscriber demand for and interest in the network, the cost of carriage, unfavorable terms and conditions of carriage, lack of appeal to advertisers and better alternative options.⁵² Many of these factors support Cablevision's decision to retier GSN.

⁴⁹ CV FOF & COL ¶ 149; CV Reply ¶ 43.

⁵⁰ CV FOF & COL ¶ 149.

⁵¹ CV FOF & COL ¶ 154; CV Reply ¶ 41.

⁵² CV FOF & COL ¶ 248.

As a threshold matter, Cablevision had no motive to discriminate against GSN because WE tv neither viewed GSN as a competitor nor included it as part of its competitive set. Had Cablevision set out to reduce the carriage of a network to aid WE tv, it would have only made sense to take such action against one that WE tv believed to be an important competitor. The evidence is crystal clear that GSN was not such a network. And it is telling that Cablevision agreed to launch _____, a women's network that WE tv did consider to be a competitive threat, in January 2011.⁵³

Further, there is no dispute that Cablevision saved _____ in annual license fees by retiering GSN or that Cablevision and other MVPDs (including DIRECTV) faced substantial cost pressures from retransmission consent fees, skyrocketing rights fees for important sports programming, and programming network bundling practices.⁵⁴ GSN's case depends upon ignoring all of this evidence and instead reaching the conclusion that Cablevision decided to retier GSN for unrelated and impermissible reasons. Once again, the weight of the evidence stands in GSN's way.

Here is what the evidence shows: Cablevision considered its decision to retier GSN in a documented process spanning many months. Cablevision's determination is reflected in contemporaneous documents, such as Mr. Montemagno's July 22, 2010 memorandum, which set out the pros and cons of continued GSN carriage.⁵⁵ That documentary evidence—supported by Mr. Montemagno's credible testimony—reveals that Cablevision considered reducing or

⁵³ CV FOF & COL ¶ 57.

⁵⁴ CV FOF & COL ¶¶ 36-40, 249-50, CV Reply ¶ 111. Cablevision also faced fierce competition from telcos such as Verizon and over-the-top content providers. CV FOF & COL ¶ 218.

⁵⁵ CV FOF & COL ¶¶ 42-45, 250-51; CV Reply ¶¶ 80, 111.

eliminating carriage of other networks, including _____, which saved its broad carriage when it agreed to a last-minute reduction in rates.⁵⁶ Although GSN pretends that the decision to retier GSN was made at the whim of Cablevision distribution chief John Bickham, the entirety of the evidence shows that Mr. Bickham drove the evaluative process undertaken by the programming and product groups, requested STB and Nielsen data on the networks, participated in numerous meetings spanning months, and relied on Mr. Montemagno's work product which, as Mr. Bickham testified, "reinforced my inclinations" that GSN was "a very weak network . . . that we could drop . . . without losing customers"⁵⁷

And the indisputable fact is that GSN was a poor performer on Cablevision, as Mr. Montemagno concluded. Although GSN pointed at purported weaknesses in one STB report cited in Mr. Montemagno's memorandum, that report is just one of a series of viewing reports Cablevision examined prior to retiering GSN.⁵⁸ Taken as a whole, the evidence clearly shows that GSN did not appeal to most Cablevision subscribers, a fact that GSN does not dispute.⁵⁹

Nor does the evidence support GSN's argument that Cablevision's failure to change its mind after hearing customer complaints is proof of hidden discriminatory intent. Although Cablevision received some _____ complaints in the first days after the retiering, the complaints tailed off almost immediately, especially after Cablevision provided a temporary Sports & Entertainment tier credit.⁶⁰ There is no reason to speculate about what Cablevision

⁵⁶ CV FOF & COL ¶¶ 47, 49, 250.

⁵⁷ CV FOF & COL ¶¶ 50, 251; CV Reply ¶¶ 80-83.

⁵⁸ CV FOF & COL ¶ 52; CV Reply ¶¶ 83, 113.

⁵⁹ CV FOF & COL ¶ 42 & n.85.

⁶⁰ CV FOF & COL ¶ 54; CV Reply ¶ 84.

would have done if the complaints had not stopped; in fact they did stop after a prudent, mitigative step that not only preserved the cost savings sought by the retiering, but ultimately generated additional revenue from subscribers who paid for the new tier of service.

As a last resort, GSN asks the Court to play “Monday morning quarterback” by claiming that an inference of discrimination can be drawn from an *ex post* assessment of the profitability of the retiering decision. Putting to one side whether any such after-the-fact economic analysis could ever discharge a complainant’s burden, the evidence shows that it does not do so here. As Mr. Orszag demonstrated at trial, GSN’s methodology is unsupported and, in fact, a reliable analysis shows Cablevision’s decision to be a profitable one.

The math supporting Cablevision’s decision is simple: it saved approximately per year in carriage fees as a result of the retiering.⁶¹ Cablevision added another subscribers to the Sports & Entertainment tier on which GSN was now carried, resulting in in additional annual profits due to the retiering.⁶² On the cost side, Mr. Orszag concluded, without contradiction, that there was no statistically significant departure of Cablevision subscribers as a result of the retiering.⁶³ Because Cablevision saved in license fees, earned substantial revenues from new Sports & Entertainment tier subscribers, and saw no meaningful increase in customer churn, the weight of the evidence supports the conclusion that Cablevision made a profitable decision.

GSN’s effort to work its way around Mr. Orszag’s analysis failed at trial. Dr. Singer’s competing cost-benefit analysis is infected by critical errors. First, although Dr. Singer

⁶¹ CV FOF & COL ¶ 258.

⁶² CV FOF & COL ¶ 189.

⁶³ CV FOF & COL ¶¶ 54, 258-59.

testified that Cablevision lost between _____ subscribers as a result of the retiering, he did not even attempt to rebut Mr. Orszag’s showing that the results of his churn analysis are not statistically significant at the commonly accepted 1%, 5%, or 10% confidence intervals.⁶⁴ Moreover, Dr. Singer’s finding of loss is further dependent on his inflated and unsupportable assumption that an additional _____ subscribers allegedly would have terminated their subscription absent the _____ subsidy that they received.⁶⁵ But this assumption is nothing more than pure conjecture. Dr. Singer applied no economic analysis—indeed, no analysis at all—to come to his conclusion that all subscribers would have churned but for the subsidy.⁶⁶ Rather, Dr. Singer acknowledged that his assumption “was based on conversations with counsel.”⁶⁷ Such conversations fall far short of the type of rigorous analysis upon which a credible expert opinion is built.

Dr. Singer further inflated the purported loss to Cablevision by attributing a monthly “loss of goodwill” of _____ to subscribers who complained but in fact neither left Cablevision nor received a subsidy.⁶⁸ There is even less of a basis for this assumption. There is no dispute that Dr. Singer’s methodology for calculating goodwill is not based on a method

⁶⁴ CV FOF & COL ¶ 193; CV Reply ¶ 88.

⁶⁵ CV FOF & COL ¶ 196; CV Reply ¶ 88.

⁶⁶ CV FOF & COL ¶ 196.

67 CV FOF & COL ¶ 194. Dr. Singer is also tripped up by his own analysis. He first testified that, of the subscribers who called prior to the authorization of the free Sports & Entertainment tier, and therefore were not subsidized, at most —actually churned away from Cablevision. He could not explain why he believed that 100% of the subscribers who called *after* February 4, 2011 would have churned, when his testimony shows that, at most, of those who called *prior* to February 4, 2011 (when no subsidy existed) would have churned. CV FOF & COL ¶ 196.

68 CV FOF & COL ¶ 197.

generally accepted by economists.⁶⁹ In the only other case in which he even referred to goodwill, Dr. Singer reached a contradictory conclusion, testifying that a loss in goodwill “defies monetary compensation.”⁷⁰

Finally, Dr. Singer asserts that it would have been more profitable for Cablevision to retier WE tv or Wedding Central. But he acknowledges that he calculated WE tv churn using the same flawed model that supported his estimate of churn caused by the GSN retiering.⁷¹ Moreover, as Mr. Orszag explained, while the actual evidence surrounding the GSN retiering can inform an economic analysis, the WE tv retiering cannot because it is purely hypothetical. As a result, there can be no reliable quantification of the effect of a hypothetical WE tv retiering on an *ex post* basis.⁷² In any event, by correcting Dr. Singer’s errors and applying Dr. Singer’s model consistently to both GSN and WE tv, Mr. Orszag demonstrated that a hypothetical WE tv retiering would have caused Cablevision far more subscriber loss than the actual GSN retiering.⁷³

II. Cablevision Did Not Unreasonably Restrain GSN’s Ability to Compete Fairly

Section 616 “appl[ies] only where an anticompetitive impact is shown in a particular case.”⁷⁴ Because every negative carriage decision adversely affects a network, the relevant question is whether that decision limits the ability of the network to compete over the long term.⁷⁵ This assessment is made “based on the impact of the defendant MVPD’s adverse

⁶⁹ *Id.*

⁷⁰ CV FOF & COL ¶ 197; CV Reply ¶ 88.

⁷¹ CV FOF & COL ¶ 198; CV Reply ¶ 89.

⁷² CV FOF & COL ¶ 199; CV Reply ¶ 115.

⁷³ CV FOF & COL ¶ 199.

⁷⁴ CV FOF & COL ¶ 226.

⁷⁵ CV FOF & COL ¶ 227.

carriage action on the programming vendor's subscribership, license fee revenues, advertising revenues, ability to compete for advertising and programming, and ability to realize economies of scale.”⁷⁶ GSN cannot satisfy its burden “merely by showing that the defendants’ individual carriage decisions adversely affected its competitive position in the marketplace.”⁷⁷

This requirement takes on considerable importance here. Cablevision has not unreasonably restrained the ability of GSN, a fully-distributed, established national network, to compete fairly in any marketplace. Since the retiering, GSN has thrived by all relevant measures. Distribution and subscribership are up. Revenues have increased.⁷⁸ The fact that GSN has lost a small percentage of its overall license fees does not mean that it has lost its ability to compete fairly—and indeed, GSN is competing and succeeding. Section 616 does not guarantee that a network will be successful with every MVPD, and unreasonable restraint on the ability to compete fairly cannot be proven simply by showing that GSN lost subscription and advertising revenue as a result of Cablevision’s carriage decision.

There is nothing about Cablevision’s purported market power that changes this conclusion. Cablevision has less than of subscribers in the national video programming market in which GSN competes, and thus is incapable of restraining GSN’s national competitive activity.⁷⁹ GSN and its economist have not defined any economically-relevant local market, and Cablevision exercises no economically meaningful power in the New York DMA. Even within its own footprint, which does not reach the entire New York DMA, Cablevision faces fierce

⁷⁶ CV FOF & COL ¶ 227.

⁷⁷ *Id.*

⁷⁸ CV FOF & COL ¶ 263; CV Reply ¶¶ 92-93.

⁷⁹ CV FOF & COL ¶ 265.

competition from DIRECTV, DISH, Verizon and AT&T.⁸⁰ Far from exercising pricing power, it is losing video subscribers.⁸¹ GSN cannot demonstrate competitive harm by simply asserting that Cablevision has market power.⁸²

III. GSN's Carriage Discrimination Complaint Is Barred by the Statute of Limitations

Under Section 616, a complaining network must bring its claim within one year of entering into "a contract with a video programming distributor" or receiving any "offer[] to carry [the network's] programming pursuant to terms" that the network alleges violates the statute.⁸³

GSN filed its complaint nearly a decade late.⁸⁴ That complaint focuses on Cablevision's

decision to re-tier GSN, which was implemented in February 2011. But Cablevision had an

absolute contractual right to drop or re-tier GSN pursuant to the carriage agreement

between the parties, as extended in .⁸⁵ To the extent GSN is aggrieved by

Cablevision's exercise of its contractual rights, the statute of limitations on GSN's claim ran, at

the latest, one year after the extension of the carriage agreement, re-

confirming Cablevision's drop rights.

⁸⁰ CV FOF & COL ¶ 267.

⁸¹ CV FOF & COL ¶ 267; CV Reply ¶ 95 n.242.

⁸² GSN's complaint should also be dismissed for the independent reason that the remedy it seeks is barred by the First Amendment. *See* CV FOF & COL ¶¶ 269-74.

⁸³ 47 C.F.R. §§ 76.1302(h)(1)-(2). Sub-section (h)(3) "applies only in cases where an MVPD denies or refuses to acknowledge a request to negotiate for carriage." *Comcast Cable Comm'ns, LLC v. FCC*, 717 F.3d 982, 996 (D.C. Cir. 2013) (Edwards, J., concurring) (the "*Tennis Channel*" action).

⁸⁴ Consistent with the Hearing Designation Order, 27 FCC Rcd. 5113, 5113-5114 n.5 (MB 2012), the parties did not develop an additional record on the statute of limitations issue at the hearing. But should the Presiding Judge determine to address the limitations issue, the record is clear and indisputable that GSN's claim is untimely.

⁸⁵ *See* CV Exh. 4 at 3 (carriage agreement, providing that Cablevision

).

GSN argues, as its counsel did in *Tennis Channel*, that its complaint need only be filed within one year of the retiering.⁸⁶ In a carefully-reasoned concurring opinion in *Tennis Channel*, Judge Edwards rejected this interpretation of the statute of limitations on the grounds that it “fail[ed] to credit the sanctity of the parties’ contractual commitments.”⁸⁷ Concluding that a complaining network has “one year from the date of contract formation to file its complaint,” Judge Edwards expressed particular concern about the use of Section 616 as a pretext to re-trade carriage agreements.⁸⁸ That concern is particularly apt here, where GSN, notwithstanding its grant to Cablevision of full drop rights, collected _____ of license fees from Cablevision before bringing its claim.

CONCLUSION

For the reasons set forth above, Cablevision respectfully submits that GSN’s complaint should be dismissed.

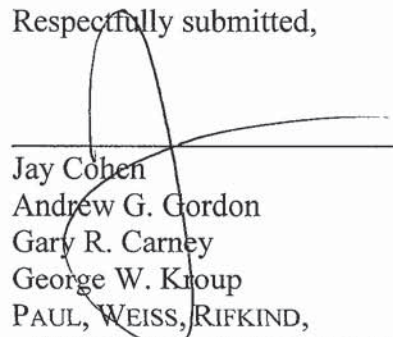
⁸⁶ See, e.g., GSN Reply at 48-50 (Jan. 17, 2012) (arguing that GSN’s claim was timely).

⁸⁷ *Tennis Channel*, 717 F.3d at 995.

⁸⁸ *Id.* at 996.

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